No. [illegible]

In the Supreme Court of the United States

October Term, 1954

[illegible]

v.

United States of America

[illegible]

INDEX

CITATIONS

300912—54

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 726

DANIEL SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 257–264) is reported at 210 F. 2d 496.

JURISDICTION

The judgment of the Court of Appeals was entered February 26, 1954 (R. 264), and a petition for rehearing was denied March 26, 1954 (R. 267). The petition for a writ of certiorari was filed April 26, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether petitioner's admission of his beginning net worth was corroborated.

2. Whether the trial court erred in admitting petitioner's sworn net worth statement without a preliminary hearing.

3. Whether, in view of the trial court's instruction that the jury should disregard petitioner's net worth admissions and evidence derived therefrom if they found that these admissions had been obtained by fraud, the Court of Appeals was required to find that there was sufficient evidence independent of the admissions to sustain the conviction.

4. Whether the Court of Appeals placed undue emphasis upon petitioner's sworn net worth statement, and if so, whether this changed the theory of the case.

STATUTE AND RULE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat

any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On November 5, 1952, petitioner and his wife were jointly named in each of five counts of an indictment filed in the United States District Court for the District of Massachusetts charging them with wilful attempts to evade and defeat their income taxes for the years 1946 through 1950 by filing fraudulent returns, in violation of Section 145 (b) of the Internal Revenue Code. (R. 5–8). The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1946)	$3,777.66	$561.00	$33,533.42	$13,757.63
Count II (1947)	4,690.27	528.00	49,738.12	24,273.88
Count III (1948)	4,849.51	422.00	58,529.48	21,442.80
Count IV (1949)	3,319.82	198.00	67,581.10	26,286.69
Count V (1950)	4,508.01	471.20	34,208.82	9,618.02

At the close of the Government's case the court granted a motion by the wife for a judgment of acquittal. (R. 184–185.) At the close of all the evidence the court granted petitioner's motion for judgment of acquittal as to the fifth count, but the jury, after deliberating less than an hour, found him guilty on the first four counts. (R. 207, 214–215.) On June 16, 1953, petitioner was sentenced to imprisonment for consecutive terms of a year and a day on each of the first four counts and was fined $5,000. (R. 25.) The Court of Appeals affirmed. (R. 257–264.)

The evidence to support the verdict may be summarized as follows:

Prior to 1941 petitioner was employed by James Coan as manager of the Union News Service, which supplied racing information to bookies in Worcester. (R. 62.) During the war years the news service did not operate, and he worked in a package store at a salary of $40 a week. (R. 63.) He managed to meet expenses during this period because he was frugal and because Coan from time to time gave him cash presents. (R. 63, 101.) His wife also worked for a short time. (R. 63.) Coan died in 1945 (R. 65), and when the need for racing information again arose in 1946 petitioner himself reopened the news service. (R. 51, 62.) He kept no records whatsoever because of the nature of the business. (R. 61.) In 1949 he ceased to operate. (R. 52.) He stated that he simply got out because it was the type of business that could not be sold. (R. 62, 130.) In December, 1949, he bought the Falmouth Bowling Club, a night club, for $75,000, making a down payment of $35,000 in cash and checks. (R. 48–50, 65–66, 109–111, 134.)

On October 13, 1950, Special Agent McMahon was assigned to investigate petitioner's income tax liability. Petitioner employed an accountant, Delaney, and after several discussions between the agent and the accountant a conference was held between McMahon, Delaney and petitioner on

April 30, 1951, during which petitioner answered questions about his connections with the Union News Service and the Falmouth Bowling Club. (R. 59–66.) He stated that he had received $100 to $250 a month from racing news customers; that some of these amounts were not reported in his returns; that no records were kept; and that he had purchased the night club with funds accumulated from his operation of the news service. (R. 50, 61, 62, 103.)

Both before and after the conference of April 30, there were numerous conversations between McMahon and Delaney concerning the preparation by Delaney of a statement showing the increases in petitioner's net worth for the years in question. (R. 71–91.) On May 24, Delaney informed McMahon that according to his figures petitioner owed $28,000 in additional income taxes plus fraud penalties. (R. 76–77, 82–83.) On June 11, Delaney told McMahon that he would bring in a $15,000 check when he submitted the statement. (R. 90–92.) On June 13, Delaney submitted to McMahon the net worth statement, signed and sworn to by petitioner, together with a check for $15,000.[1] (R. 66–67, 86, 92–93.) The check was returned to Delaney the following day on the ground that criminal proceedings against petitioner were being con-

[1] The statement was headed "Daniel and Eva Smith", but only petitioner signed and swore to it as an accurate statement of "my true worth". (R. 231; Ex. 20.)

sidered. (R. 94, 235.) The net worth statement showed increases in petitioner's net worth far in excess of the taxable income he had reported for the years involved. (R. 219, 221, 225, 227, 231.) McMahon testified that at no time during his investigation had he intended to close the case upon the receipt of a payment of back taxes by petitioner, and that he had never told Delaney that the case would be closed in that manner. (R. 87–88.)

On July 17, 1951, there was a further conference between petitioner, Delaney and several Treasury representatives. Delaney stated that he would never have had petitioner sign the net worth statement if he had not been sure that the case would be closed by the submission of the check for $15,000. McMahon told Delaney that he regretted that Delaney had gotten that impression. (R. 95–96, 128.) During the conference petitioner answered many detailed questions concerning the assets and liabilities listed in his net worth statement. (R. 131–137, 169–170.) He repeated that no records were kept for the news service. (R. 130.) He stated that no stock had been issued in the corporation formed to take over the night club, and that he kept the books and managed the business. (R. 65–66, 134–136.)

After the conference on July 17, further investigation resulted in the discovery of large bank deposits and other assets far in excess of the prior admissions of petitioner. (R. 151–153, 217–218,

231.) As fully brought out in the testimony of twenty-five witnesses for the Government, the investigation covered cash in banks (R. 27–39, 57), real estate (R. 33, 36, 37, 44–46, 65, 66, 107–111, 131, 134, 162, 163, 217, 239, 244), annuities (R. 30, 31, 36, 38, 56), furs (R. 104, 105), securities (R. 29, 32–34, 36, 37, 57, 58, 114–120), United States Government Bonds (R. 34–35), and an automobile (R. 106–107). Although many of these assets were recorded in the name of petitioner's wife, there was much evidence to indicate that he controlled them. (R. 33–37, 57–58, 110–111, 117–121.) The wife had no occupation after 1943. (R. 51.) It was determined from this investigation that for the years 1946 through 1949, petitioner should have paid $85,764 in income taxes instead of $1,509, and that his taxes were thus understated in the sum of $84,255. (R. 158–159.)

Petitioner did not take the stand in his own defense. His wife, who had been acquitted at the conclusion of the Government's case (R. 184–185), did not take the stand to testify as to the ownership of the assets disclosed by the Government's investigation. Delaney testified that McMahon had told him during the course of the investigation that he would close the case when a net worth statement and a check were submitted, and Delaney said that he would not otherwise have submitted the statement. (R. 187–191.)

ARGUMENT

1. Petitioner contends (Pet. 7, 8–9) that the opinion of the court below is in conflict with *Calderon* v. *United States*, 207 F. 2d 377 (C. A. 9th), pending on the Government's petition for a writ of certiorari, No. 577, this Term. In that case the Court of Appeals thought the record afforded no corroboration of Calderon's extrajudicial admissions as to cash on hand at the starting point, and it held that the conviction could not be sustained in the absence of such corroboration. In the present case, on the other hand, the court below accepted the rule of the *Calderon* case (R. 261), but found that petitioner's admissions had been amply corroborated (R. 262-263). Thus, regardless of the correctness of the *Calderon* rule, petitioner's contention raises no question for review by this Court.

2. As has been noted (*supra*, pp. 7, 8), petitioner's chief defense at the trial was that the net worth statement was obtained from him on the strength of a promise that the case would be closed civilly. Petitioner now contends (Pet. 7–8, 9–11) that he was entitled to a preliminary hearing on this issue, out of the presence of the jury.

The Government first introduced the net worth statement (Ex. 20) for identification during the testimony of John J. George, petitioner's brother-in-law, who had notarized petitioner's signature.

(R. 41–42.) The exhibit was again identified by Special Agent McMahon (R. 66), and McMahon was then cross-examined at considerable length by petitioner's counsel as to the discussions between himself and Delaney which preceded the submission of the statement and the $15,000 check by Delaney (R. 71–96). At the close of the second day of the trial, after the Government had introduced all its corroborative evidence, the trial court admitted the exhibit in evidence with a warning to the jury that they would ultimately have to determine whether, as a matter of fact, it had been obtained from petitioner by fraud. (R. 123–124.) Counsel for petitioner noted an objection, and the following morning he pointed out that he had Delaney present to testify on the issue and asked the court to withdraw the exhibit from evidence until he had heard all the pertinent testimony. (R. 124–125.) It does not clearly appear from the record whether petitioner's counsel was asking for a hearing out of the presence of the jury,[2] and at no time did he indicate that he desired to have petitioner testify in the absence of the jury. Ultimately Delaney testified at length on the circumstances surrounding his preparation and submission of the statement (R. 185–205) and the jury were instructed that they should disregard both the statement and all evidence obtained through it if they found

[2] Some of the remarks of the prosecutor indicate that he thought such a request had been made. (R. 125.)

the statement had been obtained by fraud or deceit (R. 210).

In *United States* v. *Carignan*, 342 U. S. 36, upon which petitioner relies (Pet. 9–10), a request was made that the *defendant himself* be permitted to testify in the absence of the jury as to the circumstances under which his confession was obtained. The request was denied, the confession was admitted, and the defendant did not thereafter take the stand. This Court, accepting the Government's concession on the point, held that the "defendant was entitled to such an opportunity to testify" out of the presence of the jury. 342 U. S., p. 38. No such circumstance is present in the case at bar. It was never suggested to the trial court that petitioner himself had any relevant evidence to offer. The defense was allowed to develop Delaney's story of the statement in full and a mere repetition of this testimony in the absence of the jury could not have had the slightest effect on the results of the trial.[3]

3. The jury were instructed to disregard petitioner's net worth statement and all evidence derived from it if they found it to be the product of deceit on the part of McMahon. Petitioner urges that the jury may have rejected the statement and convicted him on other evidence in the case, and that the Court of Appeals erred in not considering

[3] It may also be noted that the evidence on the issue had already been fully developed, prior to trial, at the hearing on a motion to suppress the statement. (R. 2, 3, 67, 194, 202.)

the sufficiency of this independent evidence. In the case upon which petitioner relies this issue was preserved by a prayer for an instruction to the jury that they must acquit the defendants if they found their confessions to have been coerced. *Stein* v. *New York*, 346 U. S. 156, 188. But no such specific instruction was requested here. Petitioner asked that the jury be told to reject his statement if they found it had been obtained by trickery. (R. 16–18.) The trial court gave this instruction in substance (R. 210, 212), and he also charged adequately on the presumption of innocence and reasonable doubt (R. 208). In view of these instructions, and in view of the fact that practically all of the Government's evidence was derived from the statement and that a conviction would have been logically impossible without this derivative evidence, it must be assumed that the jury found nothing deceitful or fraudulent in McMahon's actions. *Gallegos* v. *Nebraska*, 342 U. S. 55, 60; cf. *Stein* v. *New York*, *supra*, p. 190. It was, therefore, unnecessary for the Court of Appeals to go further in its review of the evidence.

4. Finally, petitioner contends (Pet. 8, 11–14) that the theory of the case was changed in that his net worth statement was treated as an admission in the trial court and as a confession in the Court of Appeals. The argument is without merit. Petitioner's net worth statement was plainly not a confession of guilt. In fact, the circumstances of its submission indicated an ex-

culpatory intent, for, while Delaney had estimated that the unpaid taxes plus the fraud penalty would amount to $28,000, he eliminated the penalty entirely in submitting a check for only $15,000. (R. 76–92, 187–189, 200–202, 205.) Nor was the statement treated as a confession by the Court of Appeals. The fact that petitioner signed and swore to the statement as a representation of "my true worth" was one circumstance to be considered by the jury along with numerous other facts (*supra*, p. 8) indicating that petitioner was the actual owner of the assets held in the name of his wife.

CONCLUSION

The decision below is correct, and no conflict of decisions or important question of law is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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